



U.S. Citizenship
and Immigration
Services

36

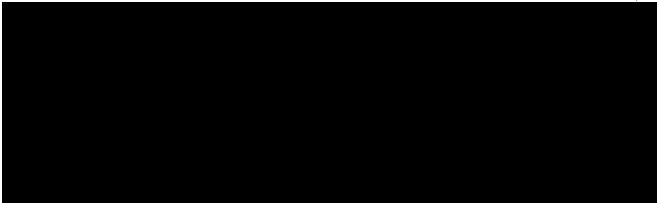


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 13 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a private non-profit ambulatory health center. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner states that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner, through counsel submits additional evidence and asserts that it has had the continuing financial ability to pay the beneficiary's proffered wage and requests reversal of the director's decision.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5 additionally provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service."

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is August 20, 2003. The beneficiary's salary as stated on the labor certification is \$45,000 per

annum, based on a 40-hour week. On Part 5 of the visa petition, the petitioner claims that it was established in 1974, currently has 125 employees, and has a gross annual income of approximately \$8,900,000. On Part B of the ETA 750, signed by the beneficiary, the beneficiary claims to have worked for the petitioner, as a volunteer, since May 2003.

Along with the beneficiary's licensing and educational credentials, the petitioner initially submitted an extract from its website containing a 2001 annual report, which indicated that the petitioner reported a net loss of \$326.

On October 28, 2003, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner had employed the beneficiary since May 2003 and requested the petitioner to submit copies of pay records that show how much the beneficiary was being paid. As an alternative, the director requested that the petitioner provide either a statement from the financial officer of the petitioner that establishes that more than 100 workers are employed and that the petitioner has the ability to pay the proposed wage offer, a copy of the petitioner's 2002 federal income tax return, or a copy of its 2002 annual report accompanied by audited or reviewed financial statements.

In response, counsel submitted a letter from the petitioner's executive assistant and an annual report for 2002. This letter confirms that the beneficiary has been working for the petitioner as an unpaid volunteer. Counsel also submitted an annual report for 2002. The annual report shows that the petitioner declared a loss of \$199,548 that year and that its current liabilities exceeded its current assets.

Based on the 2002 annual report, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, denying the petition on February 10, 2004.

On appeal, counsel submits additional promotional materials and brochures relating to the petitioning business. Counsel also submits a letter from a forensic economist [REDACTED] as well as audited financial statements from an accounting firm presenting the petitioner's financial data as of June 30, 2003. [REDACTED] asserts that the new financial statements demonstrate the petitioner's ability to pay the proffered salary and that if the petitioner's depreciation expenses are considered as available funds to pay the proffered wage, even the 2002 annual report would reflect the petitioner's ability to pay the proffered salary of \$45,000 per year.

In reviewing a petitioner's ability to pay the proffered wage, CIS examines the net income figure as reflected on the petitioner's federal income tax return, without consideration of *depreciation or other expenses*. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*,

623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. CIS will also consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and, as a measure of a petitioner's liquidity, represent an available source out of which a proposed wage offer may be paid. In this case, the petitioner's assets on its audited financial statement are characterized as restricted and unrestricted. In the accompanying notes to the financial statements, temporarily restricted assets are those contributions and grants "which are designated by donors for specific purposes." As shown on the financial statement for the period ending June 30, 2003, even without considering the temporarily restricted current assets, the petitioner's current unrestricted assets of \$1,104,430 exceeded its current liabilities of \$1,045,636, by \$58,794. This amount is sufficient to cover the proffered wage of \$45,000. As the petitioner's additional audited financial data, submitted on appeal, is more current than its 2002 annual report, and appears to satisfactorily demonstrate the petitioner's ability to pay the proffered salary, the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.